Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ALLEN MCDANIEL,
Petitioner,

v.

U.S. DEPARTMENT OF INTERIOR,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are all but one of the multiple victims of a single discriminatory promotional decision precluded from an award of compensatory damages as a matter of law, even when the employer fails to demonstrate that the same decision would have been made in the absence of discrimination?

2. Does this Court's *Reeves* summary judgment standard preclude summary judgment in an employment retaliation case based on the decisionmaker's affidavit professing innocent intent where the decisionmaker is contradicted, impeached and interested in the outcome of the motion, where indeed, a subsequent jury determines the decisionmaker lied about the underlying alleged discrimination?

PARTIES TO THE PROCEEDING

The plaintiffs in the district court action were Allen McDaniel, Joel Arnold, and Bobby Maxwell. McDaniel and Arnold thereafter appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit. The sole petitioner in this Court is McDaniel. Throughout all proceedings, the United States Department of Interior has been the only defendant.

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Petitioner Allen McDaniel respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on May 25, 2000.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Arnold et al. v. United States Department of the Interior*, 213 F.3d 193 (5th Cir. 2000), a copy of which is included as Appendix A. The judgment of the United States District Court for the Northern District of Texas is included as Appendix C.

STATEMENT OF JURISDICTION

On May 25, 2000, the United States Court of Appeals for the Fifth Circuit issued a decision affirming the judgment of the district court (App.A). The Fifth Circuit entered an order denying a timely petition for rehearing and petition for rehearing en banc on August 15, 2000 (App.B).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the mixed-motive provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981a(a)(1), which entitles victims of intentional discrimination to compensatory damages. The relevant provisions are set forth below:

42 U.S.C. § 2000e-2(m):

> . . . an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B):

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court–
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e(m):

> The term "demonstrates" means meets the burdens of production and persuasion.

42 U.S.C. § 1981a(a)(1)

> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination . . . prohib-

ited under section 703, 704, or 717 of the Act . . . , the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

STATEMENT OF THE CASE

A. Nature of the Case

This case arose in December of 1994, when Gary Johnson, Chief of the Dallas Compliance Division of the Minerals Management Service, selected Pam Rieger, a younger Asian American female, for a Supervisory Auditor position instead of selecting one of three significantly more qualified white males (Allen McDaniel, Joel Arnold and Bobby Maxwell).

Pursuant to the Equal Employment Opportunity regulations applicable to federal sector employees, the three males filed formal EEO complaints of race, gender and age discrimination with the Government. After administrative proceedings, McDaniel, Arnold and Maxwell subsequently filed a joint complaint in the U.S. District Court for the Northern District of Texas, asserting claims of race discrimination, gender discrimination and retaliation pursuant to Title VII of the Civil Rights Act of 1964, as amended.

Upon the Government's motion for summary judgment, the district court dismissed the retaliation claims before trial. The remaining claims of race and gender discrimination were tried to a jury in April 1999. The jury found that the Government had subjected all three men to race and gender discrimination. Based on a pretrial ruling, however, the jury was allowed to award monetary damages to only one plaintiff (Maxwell). As

such, the jury was not allowed to consider McDaniel or Arnold's claim to compensatory damages.

McDaniel and Arnold subsequently appealed the district court's refusal to submit the issue of compensatory damages to the jury and the district court's dismissal of their retaliation claims. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court.

The district court had jurisdiction over the underlying action pursuant to 28 U.S.C. §§ 1331 and 1343. The Fifth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

B. Statement of Facts Relevant to Issue of Compensatory Damages

McDaniel, Arnold and Maxwell applied for the position of Supervisory Auditor in the Oklahoma City office, Vacancy Announcement W-94-26. On December 30, 1994, Gary Johnson announced that he selected Pam Rieger, a 38-year old Asian American female for the position.

The three men filed formal EEO complaints of race, gender and age discrimination with the Government in early 1995. A consolidated hearing on all three complaints was held before an Equal Employment Opportunity Commission Administrative Judge on April 29-30, 1996. The Administrative Judge issued a recommended decision on June 10, 1996, concluding that there was direct evidence of gender discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended, against all three white males. The most compelling direct evidence was the testimony of a witness who was told by the selecting official, Johnson, that he was

ordered to select the minority female for the position. The Administrative Judge further concluded that the three white males had also proved unlawful race and age discrimination. Appropriate remedies were recommended, including compensatory damages. In its Final Agency Decisions, the Government admitted gender discrimination, but modified the recommended remedies.

Pursuant to the applicable federal EEO regulations, McDaniel, Arnold and Maxwell elected to file a joint complaint in the U.S. District Court for the Northern District of Texas, asserting claims of race discrimination, gender discrimination and retaliation. Upon the Government's motion for summary judgment, the district court dismissed the claims of retaliation before trial.

The remaining claims of race and gender discrimination were tried to a jury beginning on April 19, 1999. At trial, the Government argued that discrimination had not occurred, or in the alternative, that the Government was motivated by both impermissible and permissible factors in the promotion decision, and was therefore entitled to a mixed-motive jury instruction. Concluding that plaintiffs had presented direct evidence that the decision was the result of intentional discrimination, the district court instructed the jury as to the appropriate burdens in a mixed-motive case under Title VII of the Civil Rights Act of 1964, as amended. Specifically, the district court's charge to the jury first asked whether the plaintiffs had proved that gender and/or race were motivating factors in the decision to non-select the plaintiffs. The jury responded affirmatively as to both claims for all three plaintiffs.

The jury was then asked to decide whether the Government proved, by a preponderance of the evidence, that it would have made the same employment decision concerning each of the plaintiffs even if unlawful motives, namely each plaintiff's gender and race, was not present. The jury responded "No" for each plaintiff with respect to both race and gender, thereby rejecting the Government's mixed-motive defense.

Despite rejecting the Government's mixed-motive defense, however, the jury was not allowed to consider McDaniel and Arnold's claim to compensatory damages. In a pretrial ruling, the district court had concluded that since only one of the plaintiffs could have received the position at issue, only one plaintiff could recover compensatory damages as a matter of law. Since Maxwell had subsequently been placed into the position at issue when Rieger transferred to another location, the district court concluded that only Maxwell had been injured. At the close of evidence, therefore, the district court specifically instructed the jury that only Maxwell's claim for compensatory damages could be considered.

After receiving the appropriate instruction regarding compensatory damages for Maxwell, the jury awarded him $475,000.00 in compensatory damages. The district court subsequently reduced the amount to $300,000.00 to comply with the statutory caps on compensatory damage awards.

The district court entered judgment in favor of McDaniel, Maxwell and Arnold on their claims of race and gender discrimination on April 26, 1999. (App.C). McDaniel and Arnold subsequently filed an appeal with the Fifth Circuit to challenge the denial of compensa-

tory damages and the dismissal of their retaliation claims. By decision dated May 25, 2000, the Fifth Circuit affirmed the judgment of the district court (App.A). By order dated August 25, 2000, the Fifth Circuit denied a petition for rehearing. (App.B).

C. Statement of Facts Relevant to Retaliation Claim

In his Amended Complaint, McDaniel alleged that Johnson retaliated against him in January of 1997 when he eliminated two vacant supervisory auditor positions to deny him promotional opportunities. McDaniel offered substantial evidence that the elimination of the positions was retaliatory and not an innocent realignment.

Specifically, McDaniel impeached Johnson's affidavit testimony that he did not use discriminatory factors by highlighting the Government's admission of discrimination in its Final Agency Decision in the administrative process. McDaniel demonstrated that while Johnson had been ordered per the Final Agency Decision to reconduct the selection process, he failed to do so and simply selected Maxwell after relying on the admittedly discriminatory selection process used in the first place, thereby denying McDaniel the opportunity to legitimately compete.

McDaniel presented exhaustive evidence that Johnson failed to follow applicable MMS policies concerning organizational changes, including evidence that Johnson failed to involve appropriate officials in the realignment decision, had failed to complete required paperwork to support the realignment and had failed to request, or obtain, approval as required. McDaniel also demon-

strated that the realignment was suspect as it increased his workload.

Finally, McDaniel presented evidence of hostility and discriminatory animus towards him by Johnson, including testimony that Johnson admitted that discrimination had occurred in the selection of Rieger.

REASONS FOR GRANTING THE WRIT

A. THE FIFTH CIRCUIT'S DECISION REGARDING THE REMEDIES AVAILABLE TO MULTIPLE VICTIMS OF INTENTIONAL DISCRIMINATION IN A MIXED-MOTIVE CASE CONFLICTS WITH THE EXPRESS STATUTORY LANGUAGE OF TITLE VII

The Fifth Circuit's holding that when multiple job applicants are denied a promotion, only one applicant is entitled to compensatory damages as a matter of law is contrary to Title VII's express language that an employer, in a mixed-motive case, must bear the burden of proving that the same decision would have been made in the absence of discrimination.

To analyze the burdens and available remedies in a mixed-motive case, a brief history of the mixed-motive defense is appropriate.

The mixed-motive framework was defined in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989), where this Court concluded that if an employer's challenged action is motivated by both lawful and unlawful motives, the employer can avoid all liability under Title VII if it can meet the burden of persuasion in demonstrating that the same decision would have been made in the absence of the unlawful motives.

In 1991, Congress passed the Civil Rights Act of 1991 to amend Title VII and provide additional remedies for victims of discrimination. Two of the 1991 amendments are determinative of the compensatory damage issue before this Court.

First, the Act amended Title VII to allow both private and governmental employees to recover an award of compensatory damages for intentional discrimination. 42 U.S.C. § 1981a(a)(1).

Second, the Act codified the mixed-motive framework articulated in *Price Waterhouse*, with minor modification. Like *Price Waterhouse*, the Act defines a mixed-motive case as one in which "the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Thus, a mixed-motive case arises when an employee produces direct evidence that one or more discriminatory factors motivated the challenged decision, but the employer claims that the same action would have been taken in the absence of those discriminatory factors. 42 U.S.C. § 2000e-5(g)(2)(B). Importantly, the employer bears the burdens of production and persuasion with respect to its defense. 42 U.S.C. § 2000e(m).

Although Congress did not alter the respective burdens of the parties in a mixed-motive case as framed by *Price Waterhouse*, it did change the remedies available when both parties meet their burdens. While *Price Waterhouse* held that an employer could avoid all liability for relief if it met its burden of proof, the Act mandates that the employer is still liable for certain types of damages even when it meets its burden of

persuasion. 42 U.S.C. § 2000e-5(g)(2)(B). In such a case, because the employer was partially motivated by unlawful factors, the employee may be awarded injunctive and declaratory relief, as well as attorneys fees. 42 U.S.C. § 2000e-5(g)(2)(B)(i). The employer, however, is shielded from other types of remedies, including compensatory and punitive damages. 42 U.S.C. § 2000e-5(g)(2)(B)(ii).

The intended and obvious result of the above amendments is to protect an employer from compensatory damages only when that employer can prove that the same decision would have been made in the absence of the discriminatory factor. When the employer fails to meet its burden, however, its challenged action can only be attributable to impermissible factors and therefore is solely the product of intentional discrimination. Thus, all remedies are available to the employee, including compensatory damages under 42 U.S.C. § 1981a(a)(1), and the employer is not entitled to be shielded from monetary damages by 42 U.S.C. § 2000e-5(g)(2)(B)(ii). That Congress placed the burden on the employer of proving its defense demonstrates its intent to hold employers liable for compensatory damages, to the extent they are proven, except in limited circumstances.

By holding that McDaniel was not entitled to compensatory damages under 42 U.S.C. § 2000e-5(g)(2)(B)(ii) as a matter of law, the Panel effectively eliminated the employer's mixed-motive burden in its entirety and usurped the power of the jury. Concluding that since only one candidate could be selected, the Panel determined that the Government's mixed-motive defense was automatically established without any showing from the Government, in direct contradiction of Title VII and *Price Waterhouse*.

The fact that only one promotion was available does not allow the Government to side-step its Title VII burden. Regardless of the number of plaintiffs and number of positions available, Title VII requires an employer that claims a mixed-motive defense to prove that defense. In this case, therefore, the Government was required to prove that even in the absence of race and gender discrimination, McDaniel would not have received the promotion. "An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision." *Price Waterhouse*, 490 U.S. at 252.

As specifically decided by the jury, the Government was not motivated by any other factors other than race and gender at the time of its decision and the alleged selection process was nothing but a disguise to conceal the pre-determined result that the minority woman would be selected. Thus, no legitimate factor justified the selection, the Government failed to meet its statutory burden of proof, and McDaniel was entitled to the remedies available under Title VII, including compensatory damages under 42 U.S.C. § 1981a(a)(1). Moreover, as the selection process was never recreated, a legitimate selection between the three plaintiffs was never made. The Panel's contrary conclusion directly contradicts undisputed evidence that, upon Rieger's transfer, Johnson simply selected Maxwell based on the prior tainted and discriminatory selection process that led to Rieger's selection in the first place.

B. THIS CASE INVOLVES AN IMPORTANT FEDERAL QUESTION REGARDING THE APPLICATION OF TITLE VII'S REMEDIAL PROVISIONS TO MULTIPLE VICTIMS OF EMPLOYMENT DISCRIMINATION

Precluding multiple victims of employment discrimination from compensatory damages as a matter of law defeats the purposes of Title VII and ignores the injury suffered by each victim.

The primary purpose of Title VII is to provide make whole relief for victims of unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Make whole relief is designed to return the victim to a position where he would have been were it not for the discrimination. *Id.* at 420-21. The remedy must also serve as the catalyst that causes an employer to self-examine and self-evaluate its employment practices so as to eradicate discrimination. *Id.* at 418.

Simply because a single employment decision discriminates against more than one individual does not mandate a departure from the mixed-motive framework or Title VII's goal of providing make whole relief. In most circumstances, an employer will be able to meet its mixed-motive burden with respect to all but one of the victims. But where an employer fails to justify its employment decision with any legitimate factor, Title VII requires that all victims of that unlawful employment decision be compensated.

Even assuming that Maxwell was the best candidate for the promotion at issue, and would have received the promotion in the absence of discrimination, McDaniel was still a victim of blatant race and gender discrimination and suffered an "injury" that must be redressed

under Title VII. Although only one position was at issue, the Government committed three separate acts of discrimination when it selected Rieger for the position: it discriminated against McDaniel because of his race and gender; it discriminated against Maxwell because of his race and gender; and it discriminated against Arnold because of his race and gender. That only one position was at issue does not negate the very fact of the discrimination or its emotional impact on the victims.

The Office of Federal Operations of the United States Equal Employment Opportunity Commission has issued several decisions concluding that compensatory damages are available to multiple victims of a discriminatory selection process. *See, e.g., Harris v. Department of Agriculture*, EEOC Appeal No. 01966746 (1998), available at 1998 WL 897680 (EEOC); *Miller et al. v. Department of the Interior*, EEOC Request No. 05980293 (1999), available at 1999 WL 716389 (EEOC); *Deauzat v. Department of the Navy*, EEOC Appeal No. 01972261 (1997), available at 1997 WL 241520 (EEOC). Such decisions are entitled to deference.

The public policy behind the above decisions is clear: an employer should not become exempt from liability for damages simply because it elects to subject more than one employee to a discriminatory employment action. Such a result would encourage employers to engage in wide-spread discriminatory practices and ignores the fact that each employee who is subjected to unlawful discrimination has suffered an injury through the deprivation of their federally protected rights. Title VII mandates an appropriate remedy in the form of compensatory damages for that injury.

C. THE FIFTH CIRCUIT'S DECISION REGARDING MCDANIEL'S RETALIATION CLAIM CONFLICTS WITH THE JUNE 12, 2000 DECISION OF THE UNITED STATES SUPREME COURT IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*

The Fifth Circuit gave credence to contradicted and impeached evidence from an interested witness while simultaneously failing to give credence to evidence favoring the non-movant in deciding a Fed. R. Civ. P. 56 summary judgment. Both of these practices conflict with this Court's recent decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, ____ U.S. _____, 120 S.Ct. 2097 (2000). In *Reeves*, this Court articulated a clear standard for courts to apply to the evidence that they consider when deciding both motions for judgment as a matter of law and summary judgment. *Id.* at 2110. *Reeves* explained that in a Rule 50 or Rule 56 context ". . . although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.... That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.'" *Id.* This petition for writ of certiorari should be granted because the Fifth Circuit failed to follow this Court's standard when it considered the Department of the Interior's motion for summary judgment.

Specifically, the Fifth Circuit's failure to adhere to the requirements set forth by this Court can be evidenced by the Panel's discussion of the retaliation facts:

> Though [Arnold and McDaniel] argue vigorously that Johnson flouted agency procedures for conducting the realignment, Johnson, in fact, had total discretion in making the adjustment. Even so, Johnson obtained the approval of his superior and the other supervisory auditors before eliminating the positions. The unexpected retirements of two supervisory auditors – not the protected activity of Arnold and McDaniel – appears to have prompted the realignment, and Arnold and McDaniel presented no evidence inconsistent with that proposition. (Appendix at A-12, A-13).

The above analysis misapplied the *Reeves* standard by giving credence to the testimony of an interested movant who had been both contradicted and impeached. Initially, the Panel engaged in unacceptable fact-finding when it unilaterally decided that the affidavit testimony of Johnson regarding the purity of his motives was true. According to *Reeves,* it is inappropriate for the Panel to make credence determinations of an interested movant whose testimony has been contradicted or impeached. The Panel's determination of Johnson's motives cannot be supported under a *Reeves* analysis because, as the deciding official, Johnson was a party whom the jury was not required to believe. Explicitly, Johnson's motivations were contradicted as being retaliatory by the plaintiffs and effectively impeached by the findings of the Administrative Judge, the Government and, ultimately, the jury. Thus, for the Fifth Circuit to determine that Johnson was unequivocally believable blatantly disregards the standard set by this Court in *Reeves.*

Furthermore, the Panel's first analytical sentence inappropriately weighed the evidence. The Panel dis-

counted evidence produced by McDaniel that Johnson failed to follow applicable policies concerning organizational changes. In accepting the Government's contradicted evidence on this point and drawing a conclusion that Johnson had "total discretion in making the adjustment," the Panel overstepped its decision-making power and invaded the domain of the jury. The Panel, in accepting the movant's evidence that Johnson obtained the approval of his superior and other Supervisory Auditors before eliminating the positions, acted as the ultimate fact-finder. This clearly violates *Reeves* in that it makes a fact-determination on evidence that was not dispositive and was disputed by McDaniel.

The Panel's third sentence analyzing retaliation summary judgment evidence discloses two additional violations of the *Reeves* standard. First, the Panel announced that the "unexpected" retirements of two Supervisory Auditors "appears to have prompted the realignment." Such deductive reasoning is not within the Panel's powers. Whether this was an innocent realignment, or a retaliatory elimination of vacancies to pay back McDaniel for having made a (successful) complaint against Johnson for discrimination, was for a jury to decide. Moreover, the Panel's use of the adjective "unexpected" to describe the retirements is an explicit violation of the *Reeves* standard. In this situation the Panel could not draw its own inferences from disputed testimony. McDaniel presented evidence that demonstrated a question of fact existed as to the expected or unexpected nature of the retirements. According to *Reeves*, the Panel was required to infer that these retirements were expected, not unexpected, and that Johnson seized these opportunities to accomplish his retaliatory mission.

Second, the Panel's third sentence incorrectly asserted that McDaniel presented no evidence inconsistent with innocent realignment. Actually, McDaniel presented substantial evidence that the Panel either chose to discredit or to ignore. For instance, the Panel discussed but discounted McDaniel's evidence that Johnson failed to follow applicable policies concerning the organizational change. The Panel declined to mention Johnson's impeachment and McDaniel's demonstration that the decision-maker should not be entitled to credibility. The Panel also failed to mention the close time proximity between the complaints[1] and evidence of animus toward McDaniel by Johnson, and the ultimate decision on the realignment.

According to *Reeves,* summary judgment decisions are to be made after reviewing the record as a whole, disregarding all evidence favorable to the moving party that the jury is not required to believe, and giving credence to evidence favoring the nonmovant. *Id.* at 2110. Judges are allowed to base their decisions on evidence of the moving party that is uncontradicted and unimpeached to the extent that the evidence comes from disinterested witnesses. *Id.* The Panel in this case failed to follow these straight-forward guidelines. The Panel considered evidence favorable to the Government that the jury was not required to believe, and that, in light of the jury verdict rejecting Johnson's testimony on the underlying discrimination claims, it most certainly would not have believed. The Panel did not give full credence to all evidence favoring McDaniel, the nonmovant, and engaged in prohibited fact-finding by bas-

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[1] A close proximity between the time of the protected activity and the retaliatory event is evidence of nexus. *See, e.g., Swanson v. General Services Administration,* 110 F.3d 1180 (5th Cir. 1997).

ing its grant of summary judgment on contradicted and impeached evidence of the moving party. For these reasons, this petition for writ of certiorari should be granted and McDaniel should be entitled to have his retaliation claim determined by a jury rather than decided by the Fifth Circuit.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

213 F.3d 193

82 Fair Empl.Prac.Cas. (BNA) 1786,
78 Empl. Prac. Dec. P 40,055

(Cite as: 213 F.3d 193)

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

JOEL F. ARNOLD; et al.,
Plaintiffs,
JOEL F. ARNOLD; ALLEN MCDANIEL,
Plaintiffs-Appellants,
v.
UNITED STATES DEPARTMENT
OF THE INTERIOR,
Defendant-Appellee.

No. 99-10753.

May 25, 2000.

Federal employees appealed from a decision of the United States District Court for the Northern District of Texas, Jorge A. Solis, J., 2000 WL 354395, which denied their recovery on claims for gender discrimination and retaliation. The Court of Appeals, Benavides, Circuit Judge, held that: (1) federal employees were not entitled to compensatory damages for gender discrimination since they could not show that they would have garnered open position but for the discrimination, and (2) federal employees could not establish their retaliation claims since they did not show any causal link between their protected activity and the realignment.

Affirmed.

West Headnotes

[1] Civil Rights k400.1

78k400.1

Among multiple job applicants who fail to secure the position because of discrimination, only those who can prove that they would have gotten the position but for the discrimination can recover compensatory damages. Civil Rights Act of 1964, § 706(g)(2)(B)(ii), as amended, 42 U.S.C.A. § 2000e- 5(g)(2)(B)(ii).

[2] Civil Rights k400.1

78k400.1

Federal employees were not entitled to compensatory damages for gender discrimination since they could not show that they would have garnered open position but for the discrimination. Civil Rights Act of 1964, § 706(g)(2)(B)(ii), as amended, 42 U.S.C.A. § 2000e-5(g)(2)(B)(ii).

[3] Master and Servant k30(6.10)

255k30(6.10)

To state a claim for retaliation, a plaintiff must prove that: (1) he engaged in protected activity pursuant to Title VII; (2) he suffered an adverse employment action; and (3) a causal nexus exists between the protected activity and the adverse employment action. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

[4] United States k36

393k36

Assuming that realignment could be properly characterized as an adverse employment action, federal employees could not establish their retaliation claims since they did not show any causal link between their protected activity and the realignment.

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Marleigh D. Dover, Sushma Soni (argued), U.S. Dept. of Justice, Civil Div., Appellate Staff, Washington, DC, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before WIENER, BENAVIDES and PARKER, Circuit Judges.

BENAVIDES, Circuit Judge:

Appellants Joel Arnold ("Arnold") and Allen McDaniel ("McDaniel") appeal the district court's ruling as a matter of law that neither of them was entitled to compensatory damages on their claims for gender discrimination brought pursuant to 42 U.S.C. § 2000e-5. They also complain that the trial court erred when it granted the United States Department of the Interior's ("DOI") motion for summary judgment on their retaliation claim. We affirm.

I. Factual and Procedural Background

Arnold and McDaniel, along with Bobby Maxwell ("Maxwell"), all worked in the Dallas Compliance Division of the Mineral Management Service ("MMS"), a division of the DOI. Each applied for a GS-14 position as Supervisory Auditor in the Oklahoma City office, and each was placed on the "best qualified list." On the basis of the numerical assessments of the candidates on the "best qualified" list (which numbers themselves had been derived from objective criteria), Gary Johnson ("Johnson"), the Chief of the Dallas Compliance Division of the MMS, interviewed Pam Reiger ("Reiger") and Maxwell, who had the highest and second-highest scores respectively. On December 30, 1994, Johnson hired Reiger, who was an Asian-American woman.

Arnold, Maxwell, and McDaniel, all white men over the age of forty, filed administrative complaints on February 2, 1995, March 7, 1995, and March 8, 1995, respectively. They each alleged that race, gender, and age discrimination prevented their being hired for the Supervisory Auditor position. After a hearing on April 29-30, 1996, the administrative judge issued an opinion on June 10, 1996 concluding that Arnold, Maxwell, and McDaniel had presented direct evidence of gender discrimination: to wit, Johnson had marching orders to hire a woman.

By letter dated August 14, 1996, the MMS announced its final agency decision. It adopted the administrative judge's finding with respect to gender discrimination, but rejected its holding on the race and age discrimination claims, deciding that the evidence was insufficient. The MMS determined that Arnold, Maxwell, and McDaniel were entitled to compete in an unbiased

selection process and resolved to reconduct the job search.

Arnold, McDaniel, and Maxwell filed suit on November 13, 1996. Sometime thereafter, Reiger requested and received a transfer. Johnson selected Maxwell to replace Reiger.[1] Johnson then penned a justification memorandum, which Jim Shaw ("Shaw"), the Associate Director for Royalty Management, approved. Despite his promotion, Maxwell remained a plaintiff in the current suit.

Subsequent to Maxwell's promotion, two of the four Supervisory Auditors in the Dallas Compliance Division of the MMS ***195** retired. After each retirement, Johnson elected to eliminate the position, as opposed to hiring a successor. Johnson's decision in this regard was consistent with agency-wide down-sizing and streamlining, and Johnson confirmed with Lucy Querques-Dennet, Shaw's replacement, that realignment in this manner was wholly within his discretion. Johnson also obtained the unanimous approval of the remaining Supervisory Auditors (including Maxwell) when he decided to reduce the total number of Supervisory Auditors.

Convinced that this realignment was actually a form of retaliation against them, Arnold and McDaniel amended their complaint to state a claim for retaliation. The trial court granted summary judgment to the DOI on the retaliation claim on July 26, 1997. And at a pretrial hearing on April 14, 1999, the district court determined

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[1] Counsel for the DOI admitted at oral argument that Johnson considered only Arnold, McDaniel, and Maxwell in selecting Reiger's replacement.

that neither Arnold nor McDaniel could present evidence at trial supporting their claim for compensatory damages because Maxwell's promotion precluded both Arnold and McDaniel from proving that they would have netted the job "but for" the discrimination. After a trial ending on April 23, 1999, the jury found in favor of Arnold, McDaniel, and Maxwell on their race and gender discrimination claims and awarded Maxwell $300,000 in compensatory damages.[2] The jury specifically rejected the DOI's defense that it would have failed to hire Arnold and McDaniel even if gender had not been a consideration. The district court awarded attorneys' fees and costs to the plaintiffs.

Arnold and McDaniel, though not Maxwell, timely filed this appeal.

II. Standard of Review

Both the decision that, as a matter of law, Arnold and McDaniel could not prove that they would have obtained the job "but for" the discrimination and the grant of summary judgment on the retaliation claim are issues of law to which we apply de novo review. *See Hall v. Thomas*, 190 F.3d 693, 695 (5th Cir.1999) (summary judgment); *Randel v. United States Dep't of the Navy*, 157 F.3d 392, 395 (5th Cir.1998) ("Questions of law we review de novo.").

The district court should grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as

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[2]The jury had actually awarded Maxwell $450,000, but the district court capped that amount pursuant to Title VII's limitations on damages.

to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c); *see also Christopher Village, LP v. Retsinas*, 190 F.3d 310, 314 (5th Cir.1999). "An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party." *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521, 523 (5th Cir.1999), cert. denied, — U.S. ——, 120 S.Ct. 1423, 146 L.Ed.2d 314 (2000). "Although we consider the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the nonmovant, the nonmoving party may not rest on the mere allegations or denials of its pleadings, but must respond by setting forth specific facts indicating a genuine issue for trial." *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 505 (5th Cir.1999), cert. denied, — U.S. ——, 120 S.Ct. 1171, 145 L.Ed.2d 1080 (2000).

III. Compensatory Damages

Arnold and McDaniel argue that the district court erred when it forbade them from presenting evidence on their claim for compensatory damages and refused to submit the same to the jury. Specifically, Arnold and McDaniel assert that, because the jury rejected the DOI's mixed motive defense, they are therefore entitled to compensatory damages.

The DOI retorts that the district court acted properly because compensatory damages are not available to plaintiffs who ***196** cannot show that discrimination was the "but for" cause of the failure to hire. The DOI further argues that the jury verdict, coming as it did on the heels of the district court's dismissal of Arnold and McDaniel's claims for compensatory damages, is a nullity.

Title 42 U.S.C. § 1981a(a)(1) states "In an action brought by a complaining party under ... [§ 2000e-5] against a respondent who engaged in unlawful intentional discrimination ... prohibited under ... [§ 2000e-2] ..., the complaining party may recover compensatory and punitive damages ..., in addition to any relief authorized by ... [§ 2000e-5(g)]." This is the language that Arnold and McDaniel claim presumptively entitles them to compensatory damages.[3] They also urge us to follow *Willson v. Shannon*, 857 F.Supp. 34 (S.D.Tx.1994), aff'd in part, 77 F.3d 473 (5th Cir.1995) (unpublished), which, in the course of denying a motion for a new trial, rejected

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[3] Arnold and McDaniel also rely on three EEOC agency decisions. See Miller v. Babbit, 1999 WL 716389 (EEOC); *Harris v. Glickman*, 1998 WL 897680 (EEOC); Deauzat v. Dalton, 1997 WL 241520 (EEOC). These cases, broadly speaking, stand for the proposition that, "even if a victim of a discriminatory selection process is not awarded the position during re-selection, he is nonetheless entitled to compensatory damages, if proven, for having been subjected to a discriminatory selection process in the first instance." Miller, 1999 WL 716389, at *4. However, one of the cases permits an award of compensatory damages only "up until ... the date on which the AJ issued her RD finding that Complainant A was the best qualified candidate and would have been selected for the position absent the agency's discrimination." Harris, 1998 WL 897680, at *3. In other words, even under the EEOC decisions, Arnold and McDaniel could not recover compensatory damages past the date on which Maxwell received the position of Supervisory Auditor.

"An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); *Gomez v. Department of the Air Force*, 869 F.2d 852, 860 (5th Cir.1989) (same). To the extent that these EEOC decisions conflict with § 2000e-5(g)(2)(B)(ii), they are neither binding nor entitled to deference.

the argument that because "only one ... position had been available for either Plaintiff to fill, and that only one of the Plaintiffs could have obtained the position even in the absence of discrimination, ... only one Plaintiff should be able to recover damages[.]" *Id.* at 35. The court condemned this argument as it "would allow ... discriminat[ion] with respect to any given position with impunity for near perpetuity, once [the agency] has become liable for discriminating once." *Id.*[4]

However, what Willson does not even mention (indeed Willson cites no law in support of its position), and what the DOI highlights, is § 2000e-5(g)(2)(B)(ii), which states: "On a claim in which ... the respondent demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor, the court .... shall not award damages [.]" This section establishes what is known as "the mixed motive defense." The DOI insists that this language absolves it of liability for compensatory damages to Arnold and

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[4] Even were Willson persuasive, it is not binding for four reasons. First, though Willson was affirmed in part in an unpublished opinion, pursuant to Local Rule 47.5.3, "[u]npublished opinions issued before January 1, 1996 .... should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable." None of those doctrines is relevant here. Second, the unpublished affirmance did not discuss Willson 's reasoning, but instead merely found the denial of a motion for new trial to be not plain error. Third, Willson itself is factually distinguishable, involving, as it appears to, successive denials of an open job position to female applicants. Finally, as is detailed below, Willson conflicts with language in *De Volld v. Bailar*, 568 F.2d 1162 (5th Cir.1978), and, under the rule of orderliness, to the extent that a more recent case contradicts an older case, the newer language has no effect. *See Teague v. City of Flower Mound*, Texas, 179 F.3d 377, 383 (5th Cir.1999).

McDaniel because the DOI would not have hired Arnold and McDaniel regardless of their gender for the simple reason that it promoted Maxwell instead. ***197** The DOI also relies on *De Volld v. Bailar*, 568 F.2d 1162 (5th Cir.1978), in which a panel of this circuit stated:

> It must be kept in mind that only one person could be promoted to the position in question. Both Mexican-American clerks [Trevino and De Volld] were concededly treated discriminatorily in that both were passed over because of their national origin. But the blunt fact remains that only one of the two if either could receive the promotion. When the Civil Service Commission determined that the deserving candidate was Trevino ..., it became indisputable that whatever discrimination [De Volld] suffered because of her national origin, that discrimination no longer kept her from the promotion. Put another way, whatever motives the Commission may have had in choosing between two people of the same ethnic origin, discrimination cannot have been among them.... In this case the administrative award to [Trevino] removes any possibility that [De Volld] can prove that her situation is due to discrimination against her as a Mexican-American.

Id. at 1164-65; see also Pollard v. Grinstead, 741 F.2d 73, 75 (4th Cir.1984) ("Pollard ... did not ... prove that the agency discriminated against him when it [decided] ... that Webb was better qualified. Pollard was refused promotion, in the words of the statute, for a 'reason other than discrimination.' The absence of discrimination when the agency weighed the qualifications of the two applicants bars relief." (quoting § 2000e- 5(g))); *Burks v. City of Philadelphia*, 950 F.Supp. 678, 689

(E.D.Pa.1996) ("[F]ederal appellate courts have followed the rule that an employee should be denied damages if her qualifications relative to another candidate were such that he or she would not have received the position.").

[1][2] The statutory language and the case law set forth the rule plainly enough: among multiple job applicants who fail to secure the position because of discrimination, only those who can prove that they would have gotten the position but for the discrimination can recover compensatory damages. Arnold and McDaniel are not candidates who, but for the discrimination, would have received the Supervisory Auditor position for the following reasons: (1) only one position was open; (2) Johnson considered only Arnold, McDaniel, and Maxwell in selecting Reiger's replacement; and (3) neither Arnold nor McDaniel contend that a discriminatory motivation tainted Johnson's selection of Maxwell. Moreover, it flies in the face of all reason that all three would have been chosen for only one position. For these reasons, Arnold and McDaniel cannot show that they would have garnered the job but for the discrimination and consequently cannot demonstrate that they are entitled to compensatory damages. Therefore, the district court did not err.

Arnold and McDaniel emphasize the jury's special finding that the DOI would have hired them if gender had not been a motivating factor precludes the DOI's reliance on the mixed motive defense. The jury's special interrogatory, however, is not determinative of this issue. Whether Arnold and McDaniel could recover compensatory damages "was a matter of statutory interpretation ... properly decided by the court[.]" *United States v. Nolan*, 136 F.3d 265, 271 (2d Cir.1998). Hav-

ing correctly determined that § 2000e-5(g)(2)(B)(ii) precluded Arnold and McDaniel's entitlement to compensatory damages, the court definitively disposed of the matter; a subsequent jury pronouncement on an issue no longer in the case is of no effect.

We therefore find that the district court did not err in ruling, as a matter of law, that Arnold and McDaniel could not recover compensatory damages.

IV. Retaliation

Arnold and McDaniel identify the realignment as a form of retaliation because it foreclosed promotion opportunities for ***198** them, and it increased their workload. The DOI counters that the realignment is not an ultimate employment decision, and therefore, not an adverse action sufficient to state a prima facie claim for retaliation. Moreover, the DOI urges that no causal link exists between Arnold and McDaniel's protected activity and the realignment.

[3][4] To state a claim for retaliation, a plaintiff must prove that: (1) he engaged in protected activity pursuant to Title VII; (2) he suffered an adverse employment action; and (3) a causal nexus exists between the protected activity and the adverse employment action. *See Messer v. Meno,* 130 F.3d 130, 140 (5th Cir.1997). Assuming arguendo that the realignment can be properly characterized as an adverse employment action, Arnold and McDaniel have not established any causal link between their protected activity and the realignment. Though they argue vigorously that Johnson flouted agency procedures for conducting the realignment, Johnson, in fact, had total discretion in making the adjustment. Even so, Johnson obtained the approval of his superior and the other Supervisory Audi-

tors before eliminating the positions. The unexpected retirements of two Supervisory Auditors—not the protected activity of Arnold and McDaniel—appears to have prompted the realignment, and Arnold and McDaniel present no evidence inconsistent with that proposition. Therefore, the district court did not err when it granted the DOI summary judgment on the retaliation claim.

V. Conclusion

Because we find that the plain language of § 2000-e5(g)(2)(B)(ii) forbids an award of compensatory damages to a job applicant who, despite unlawful discrimination, still would not have received the job, we hold that the district court did not err when it ruled as a matter of law that Arnold and McDaniel were not entitled to compensatory damages.

We further hold that Arnold and McDaniel did not demonstrate a causal link between their protected activity and the realignment that foreclosed their opportunities for promotion. The district court therefore did not err when it granted the DOI's motion for summary judgment on the retaliation claim.

AFFIRMED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 99-10753

JOEL F. ARNOLD; ET AL
Plaintiffs
JOEL F. ARNOLD; ALLEN MCDANIEL
Plaintiffs - Appellants

v.

U.S. DEPT. OF INTERIOR
Defendant - Appellee

[Filed August 15, 2000]

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 05/25/00, 5 Cir., _____, _____ F.3d _____)

Before WIENER, BENAVIDES, and PARKER, Circuit Judges.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOEL ARNOLD, ET AL.,
plaintiffs,

v.

BRUCE BABBITT, Secretary,
U.S. DEPARTMENT OF THE INTERIOR,
Defendant.

NO. 3:96-CV-3077-P

[Filed April 26, 1999]

FINAL JUDGMENT

Pursuant to the jury verdict of April 23, 1999 and previous ruling of the court, judgment is issued as follows:

It is ORDERED ADJUDGED and DECREED that,

1. Plaintiff Bobby Maxwell is awarded compensatory damages in the amount of $300,000.00

2. All plaintiffs are awarded costs and attorneys fees. Claims for attorneys fees must be made in accordance with Federal Rule of Civil Procedure 54(d)(2).

IT IS SO ORDERED.

Signed this 26th day of April, 1999 at Dallas, Texas.

/s/ Jorge A. Solis
Jorge A. Solis
United States District Judge
NORTHERN DISTRICT OF TEXAS

FINAL JUDGMENT

(2)

Supreme Court, U.S.
FILED
DEC 28 2000
OFFICE OF THE CLERK

No. 00-760

In the Supreme Court of the United States

ALLEN MCDANIEL, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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- 18 pp

QUESTIONS PRESENTED

1. Whether, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, compensatory damages are available to a job applicant who was not chosen for a vacant position, when the employer ranked the applicant below at least one other disappointed applicant as part of its selection process, and this ranking was not alleged to be discriminatory.

2. Whether the court of appeals erred in determining that petitioner had presented no relevant evidence regarding the existence of a retaliatory motive.

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In the Supreme Court of the United States

No. 00-760

ALLEN MCDANIEL, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 213 F.3d 193. The final judgment (Pet. App. A16-A17) of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2000. A petition for rehearing was denied on August 15, 2000 (Pet. App. A14-A15). The petition for a writ of certiorari was filed on November 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Joel Arnold, and Bobby Maxwell worked for the Dallas Compliance Division of the Department of the Interior's Minerals Management Service (MMS), and applied for a single vacant position as a GS-14 Supervisory Auditor in the MMS's Oklahoma City office. All three men are white males, and all three were placed on a "best qualified" list for the position and referred to selecting official Gary Johnson, Chief of the Dallas Compliance Division. Pet. App. A4. Johnson interviewed the two candidates on the list who had the highest numerical evaluations. Those candidates were Maxwell and Pam Reiger, a woman of Asian descent. Johnson hired Reiger. *Ibid.*

Petitioner, Arnold, and Maxwell each separately filed a complaint alleging discriminatory selection. The complaints were consolidated for a hearing before an administrative judge of the Equal Employment Opportunity Commission (EEOC). The administrative judge issued a recommended decision finding discrimination on the basis of race, gender, and age. See Pet. App. A4. The MMS adopted the recommended finding of gender discrimination but denied discrimination on the basis of age or race. *Ibid.* The MMS stated that it would remedy the gender discrimination by conducting a new, nondiscriminatory selection process that included Reiger and the three complainants. *Id.* at A4-A5.

Reiger requested and received a transfer, thereby removing herself from the new selection process. Pet. App. A5. With the approval of his superior, Johnson then selected Maxwell, the second-highest ranking candidate for the original vacancy, to replace Reiger. *Id.* at A4-A5 & n.1.

After Maxwell was promoted, two other GS-14 Supervisory Auditors retired. Pet. App. A5. Consistent with an agency-wide downsizing, and after receiving the concurrence of his superior as well as the remaining Supervisory Auditors (including Maxwell), Johnson eliminated the two GS-14 positions instead of hiring successors. *Ibid.*

2. Petitioner, Arnold, and Maxwell brought suit against the MMS, alleging discriminatory promotion on the basis of race and gender, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Petitioner and Arnold also alleged that elimination of the two GS-14 Supervisory Auditor positions constituted retaliation against them. *Id.* at A5.* With respect to the retaliation claims, the district court granted the government's motion for summary judgment, holding that Johnson's elimination of the two GS-14 positions did not constitute an adverse employment action and, in any event, the plaintiffs did not show they would have been selected for either position. See *Id.* at A5. With respect to the race and gender discrimination claims, the district court instructed the jury that if plaintiffs proved discrimination on the basis of race or gender, only Maxwell could recover compensatory damages, because only he could show that he would have obtained the job but for the discrimination. The proof to that effect was that Maxwell had the second-highest numerical ratings and was interviewed in the initial selection process, and was

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* The plaintiffs also alleged age discrimination in violation of the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (29 U.S.C. 621 *et seq.*), but did not pursue this claim at trial.

awarded the GS-14 position after Reiger's transfer. Pet. 6; Pet. App. A5-A6.

The jury returned a verdict in favor of the plaintiffs, finding that both gender and race were, more likely than not, motivating factors in the decision not to select any of the plaintiffs for the Supervisory Auditor position. See Pet. 5. The jury also specifically found that the agency did not prove that it would have made the same employment decision concerning each of the plaintiffs if the unlawful motives of gender and race had not been present. See Pet. 6. The jury awarded Maxwell compensatory damages, which the district court reduced to $300,000 pursuant to the damages cap of 42 U.S.C. 1981a(b)(3)(D). See Pet. App. A6. The district court awarded all plaintiffs costs and attorney's fees. *Id.* at A16.

3. Petitioner and Arnold appealed the district court's grant of summary judgment on their retaliation claims and the district court's ruling that compensatory damages were not available to them. The court of appeals affirmed. Pet. App. A1-A13. Regarding compensatory damages, the court of appeals noted that under 42 U.S.C. 2000e-5(g)(2)(B), damages are not available when the "respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. 2000e(g)(2)(B); see Pet. App. A9. Based upon that statutory language and decisions of other federal courts, the court of appeals held that "among multiple job applicants who fail to secure the position because of discrimination, only those who can prove that they would have gotten the position but for the discrimination can recover compensatory damages." *Id.* at A11. Neither petitioner nor Arnold would have been promoted to the GS-14 position because there was only one

open position, and it was undisputed that discrimination did not taint Johnson's selection of Maxwell over both petitioner and Arnold for this position. *Ibid.*

With respect to the retaliation claims, the court of appeals concluded that even if one assumed that eliminating two Supervisory Auditor positions was an adverse employment action against petitioner and Arnold, they had "present[ed] no evidence" to establish a causal link between the action and their protected activity under Title VII, as would be necessary to make out a retaliation claim. Pet. App. A12-A13.

The court of appeals denied a petition for rehearing and rehearing en banc. Pet. App. A14-A15.

ARGUMENT

The fact-specific decision of the court of appeals is consistent with the text of Title VII, and there is no conflict with the decisions of this Court or any other court of appeals. Further review is not warranted.

1. In pertinent part, Title VII prohibits an employer from "fail[ing] or refus[ing] to hire * * * any individual, or otherwise * * * discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. 2000e-2(a)(1); and from discriminating against a job applicant because he or she has opposed an unlawful employment practice or "made a charge, testified, assisted, or participated in any manner" in Title VII proceedings, 42 U.S.C. 2000e-3(a). Those provisions apply to federal employers. See 42 U.S.C. 2000e-16(a) (1994 & Supp. IV 1998); 42 U.S.C. 2000e-16(d).

In 1991, Congress amended Title VII to allow complainants to recover compensatory and punitive damages in addition to the existing remedies of rein-

statement, back pay, front pay, and declaratory and injunctive relief. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072 (42 U.S.C. 1981a(a)(1)). Both compensatory and punitive damages are limited to certain dollar amounts, based upon the size of the employer. 42 U.S.C. 1981a(b)(3). The Civil Rights Act of 1991 also amended Title VII to provide that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). When the "respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor," however, remedies are limited to declaratory relief, injunctive relief, and attorney's fees and costs. Damages may not be awarded. 42 U.S.C. 2000e-5(g)(2)(B).

2. Both the district court and the court of appeals concluded that, absent gender and race discrimination, petitioner would not have been hired for the GS-14 Supervisory Auditor position because he was less qualified than Maxwell, another white male. Pet. App. A11. Petitioner accepts that he would not have been hired over Maxwell. See *ibid.* Nevertheless, petitioner argues that the government may not rely upon Section 2000e-5(g)(2)(B)'s bar to damages because the jury found that Johnson's decision to hire Reiger over petitioner was not motivated by factors other than race and gender. Pet. 11; see Pet. 6 (discussing jury verdict).

As the court of appeals correctly concluded, the jury's rejection of the government's mixed-motive defense with respect to the hiring of Reiger over petitioner, Arnold, and Maxwell did not establish that petitioner would have received the promotion over Maxwell

—it was undisputed that he would not. Nor did the jury's finding resolve the legal question whether petitioner could recover compensatory damages. Pet. App. A11-A12. "[I]t flies in the face of all reason that all three [white men] would have been chosen for only one position" (*id.* at A11), and petitioner does not contest that at least two facts—Johnson's selection of Maxwell to be interviewed during the first hiring process and his selection of Maxwell to assume the vacant GS-14 position after the second hiring process—showed that petitioner would not have received the position if the first hiring decision had been nondiscriminatory.

For similar reasons, there is no merit to petitioner's suggestion that the MMS could remove the taint of its discriminatory selection of Reiger only by "re-creat[ing]," after Reiger's reassignment, the initial hiring process. Pet. 11. Once again, as the court of appeals noted, neither petitioner nor Arnold has ever contended that an unlawful motivation tainted the selection of Maxwell, who had stronger evaluations than either petitioner or Arnold based upon objective criteria. Pet. App. A4, A11. Absent any evidence that the MMS's selection of Maxwell over petitioner was discriminatory, the court of appeals correctly held as a matter of law that the government proved—through the undisputed evidence that there was only one job, for which Maxwell was more qualified than petitioner —that the MMS "would have taken the same action" of denying petitioner the vacant GS-14 "in the absence of" race and gender discrimination. 42 U.S.C. 2000e-5(g)(2)(B).

Although petitioner does not suggest that the court of appeals' decision on the compensatory damages issue conflicts with any decision of this Court or of another court of appeals, he does allege inconsistency with

decisions issued by the EEOC. Pet. 13. Only one of the three EEOC decisions on which petitioner relies (*Harris* v. *Glickman*, Appeal No. 01966746, 1998 WL 897680 (EEOC Dec. 11, 1998)) analyzes the question whether compensatory damages are available to multiple employees who are denied a single position in a discriminatory selection process. See also *Miller* v. *Babbitt*, Request No. 05980293, 1999 WL 716389, *4 (EEOC Sept. 2, 1999) (relying upon *Harris*). As the court of appeals noted (Pet. App. A8 n.3), the EEOC held in *Harris* that compensatory damages were available to a non-selected employee only until the date on which an administrative judge found, using nondiscriminatory criteria, that another employee was better qualified for the position at issue. *Harris*, 1998 WL 897680 at *3. In this case, Johnson chose Maxwell to be interviewed in the initial selection process based upon Maxwell's superior numerical evaluations, and the ranking of Maxwell over petitioner was confirmed in the second hiring process. Pet. App. A4. Johnson's nondiscriminatory ranking of Maxwell over petitioner renders the unavailability of damages in this case entirely consistent with the limited damages award in *Harris*. In both cases, damages were unavailable after there was an untainted determination that the party claiming discrimination would not have received the position.

3. Finally, petitioner challenges (Pet. 14-18) the court of appeals' ruling that he and Arnold presented no evidence supporting a causal link between the protected activity of petitioner and Arnold and the elimination of two GS-14 Supervisory Auditor positions. Pet. App. A13. Petitioner does not contend that his claim involves any unsettled question of law, but rather that the courts below improperly evaluated the evi-

dence under Fed. R. Civ. P. 56. See Pet. 17 (citing *Reeves* v. *Sanderson Plumbing Prods. Inc.*, 120 S. Ct. 2097, 2110 (2000)). Petitioner, moreover, does not dispute the key facts cited by the court of appeals: Johnson's decision to eliminate the two positions was consistent with an agency-wide downsizing and was made with the concurrence of Johnson's superiors and the remaining Supervisory Auditors. See Pet. App. A5, A12-A13. Nor does petitioner support his arguments that Johnson failed to follow MMS policies and that the court of appeals improperly "discredit[ed] or * * * ignore[d]" evidence submitted by petitioner. Pet. 17. In any event, none of those fact-bound questions has significance beyond this case and none warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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